IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 2ND JANUARY 2007 / 12TH POUSHA, 1928

CRP.No. 716 of 2004(E)

AGAINST THE ORDER DATED 25/03/2004 IN IA. 5669 /2003 IN OS.51/1997 of II ADDL.SUB COURT,TRIVANDRUM

REVN. PETITIONER: PETITIONER IN I.A. & 2ND DEFENDANT IN THE O.S.

DR.INDIRA BAI AMMA,
D/O.BHAGAVATHIKUTTY AMMA, T.C.5/1970,
SREE KRISHNA LANE, KOWDIAR, THIRUVANANTHAPURAM.

BY ADV. SMT.PREETHY KARUNAKARAN
SRI.R.RAJESH KORMATH
SMT.MEENA.A.
SRI.JAYKAR.K.S.
SRI.RAHUL VARMA
SRI.V.S.ROBIN

RESPONDENTS: COUNTER PETITIONERS 1 TO 5 IN IA&PLAINTIFFS 2 TO 4 AND DEFENDANTS 1 & 3 IN O.S.

1. NIMMY, D/O.NALINI DEVI, AGED ABOUT 15 YEARS, VILAYIL PUTHEN VEEDU, T.C.11/1836, YMR.JUCTION, NANTHANCODE, KOWDIAR VILLAGE, THIRUVANANTHAPURAM(THE IST RESPONDENT HEREIN IS REP. BY HER FATHER & NATURAL GUARDIAN,MOHANAN, THE 2ND RESPONDENT HEREIN).

2. MOHANAN, S/O.CHELLAPPAN PILLAI, VILAYIL PUTHEN VEEDU, T.C.11/1836, YMR JUNCTION, NANTHANCODE, KOWDIAR VILLAGE, THIRUVANANTHAPURAM.

3. RAJAMMA, W/O.LATE PARAMESWARAN PILLAI, VILAYIL PUTHEN VEEDU,T.C.11/1836, YMR JUNCTION, NANTHANCODE, KOWDIAR VILLAGE, THIRUVANANTHAPURAM.

4. THE STATE OF KERALA, REP. BY THE CHIEF SECRETARY, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

5. DR.RAJASEKHARAN NAIR, T.C.11/411, ASHIS, NANTHANCODE, THIRUVANANTHAPURAM.

BY ADV. SRI.P.GOPALAKRISHNAN NAIR
SRI.A.ABDUL KHARIM

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 02/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.R.P.716/04

APPENDIX

ORDER ON I.A.1775/04 & I.A.1387/05 DISMISSED IN C.R.P.716/04

2.01.07. SD/-M.SASIDHARAN NAMBIAR, JUDGE.

/TRUE COPY/

PA TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

C.R.P.NO.716 OF 2004

DATED THIS THE 2nd DAY OF JANUARY, 2007

ORDER

Petitioner is the second defendant in O.S.51/97 on the file of Second Addl. Sub Court, Thiruvananthapuram. The suit was originally filed as O.P.(Indigent) 46/91. As per order dated, 6.6.96, six petitioners therein were permitted to sue as indigent persons. According to petitioner subsequently on 9.10.96, out of six petitioners, four petitioners presented a fresh plaint, which was taken on file by learned Sub Judge. On 14.1.2000,for the failure of plaintiffs to take summons on second defendant, suit as against second defendant was dismissed. The suit was posted for settlement of issues as against other defendants. Plaintiffs thereafter filed I.A.1236/03, an application under Order IX Rule 9 of Code of Civil Procedure and I.A.1234/03, an application under Section 5 of the Limitation Act to condone the delay in filing the application. There was a delay of 1107 days. Learned Sub Judge as per order dated 21.7.03, allowed the applications, without serving notice on second defendant. Second defendant therefore filed I.A.5669/03 to review the order and to dismiss the applications as not maintainable. Under the impugned order dated 25.3.04, learned Sub

Judge partly allowed I.A. 5669/03 and set aside the orders passed in I.A.1236/03 and 1234/03 and posted for further enquiry after granting an opportunity to second defendant to contest the matter. This revision is filed challenging that order.

2. The case of petitioner was that the dismissal of the suit as against second defendant was not under Order IX Rule 9 of the Code but under Order IX Rule 5 of the Code of Civil Procedure and no application will lie to set aside that order and the remedy is only to file a fresh suit. It was argued that the suit as framed is not maintainable as the original petitioners, who were permitted to sue as indigent persons, are not the plaintiffs and the plaint was a fresh plaint, which was subsequently filed and as the dismissal of the suit was under Rule 5 of Order IX, learned Sub Judge should have dismissed I.A.1236/03 and 1234/03 on that sole ground and the impugned order is to be set aside.

3. Learned Counsel appearing for respondents 2 and 3 argued that revision itself is not maintainable as the impugned order was passed in an application filed to review the order passed earlier, as an appeal is provided under Order XLIII Rule 1 of the Code as against that order.

4. On hearing learned Counsel appearing for petitioner and respondents, I do not find any reason to interfere with the impugned order. As per the impugned order, learned Sub Judge set

aside the earlier order passed in I.A.1236/03 and I.A.1234/03 on the ground that the orders were passed without notice to second defendant and without granting opportunity to second defendant to oppose the same. As per impugned order, learned Sub Judge granted opportunity to petitioner to contest the applications. Petitioner is at liberty to file objections to the applications taking up all the contentions raised in this revision petition, including the question of jurisdiction of learned Sub Judge to set aside the order under Order IX Rule 9 of the Code. Learned Sub Judge may dispose the applications as expeditiously as possible and in any event within forty five days from the date of receipt of a copy of this order.

Revision is disposed accordingly

M.SASIDHARAN NAMBIAR,JUDGE

Acd